

ISSUES

1. Is claimant entitled to a review and modification of the Award entered on June 13, 2005? Claimant argues that, based on *Bergstrom*¹, a modification of this award and an increase under K.S.A. 44-510e is appropriate. Respondent argues that there has been no change in circumstances and, therefore, the original Award cannot be modified as the findings are res judicata and the law of the case, citing *Scheidt*,² *Rivera-Garay*³ and *Urbano*.⁴
2. If claimant is entitled to a review and modification of the original Award, what is the effective date of the review and modification? Respondent argues that either claimant is precluded from any award as *Bergstrom* can only be applied prospectively from the date the case took effect, which is after the 415 weeks of entitlement to benefits has run, pursuant to K.S.A. 44-510e(a)(3), or, in the alternative, the 6-month limitation in K.S.A. 44-528(d) would apply. Claimant argues that the decision of the ALJ to apply *Bergstrom* retroactively and the decision that the 6-month limit does not apply are both proper and should be affirmed.

FINDINGS OF FACT

Claimant, a long-term employee of respondent, suffered an accidental injury on September 5, 2001, when she and another employee were taking a resident to a doctor's appointment. When the resident and the other employee started to fall, claimant stepped in and attempted to catch them. In doing so, claimant injured her back. Claimant was referred for medical treatment, and returned to an accommodated position with respondent in December of 2001. Claimant remained in the employ of respondent until her termination on January 26, 2004. The termination resulted from numerous conflicts between claimant and Janie Jarrett, respondent's administrator. Ms. Jarrett testified to several incidents of insubordination and attitude problems on claimant's part. Claimant has remained unemployed since the termination.

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

² *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan App. 2d 259, 211 P.3d 175 (2009).

³ *Rivera-Garay v. McCrite Plaza Retirement Comm.*, No. 1,000,191, 2010 WL 517308 (Kan. WCAB Jan. 29, 2010).

⁴ *Urbano v. Koch-Glitsch, L.P.*, Nos. 1,008,817 & 1,008,818, 2008 WL 2354913 (Kan. WCAB May 29, 2008).

The Board determined that claimant's award should be limited to her functional impairment of 20 percent to the whole body, citing *Foulk*⁵ and *Copeland*.⁶ The Board then further reduced claimant's impairment by a preexisting 12 percent whole body impairment from the settlement of a prior workers compensation claim, pursuant to K.S.A. 44-501(c). This 8 percent whole body functional impairment award, dated November 28, 2005, was not appealed.

On June 4, 2009, claimant filed an Application for Review and Modification of the previous Award, citing *Bergstrom* as the basis for a permanent partial general (work) disability under K.S.A. 44-510e.

The ALJ granted claimant's request, finding that *Bergstrom* did apply to this situation. Additionally, the ALJ ruled that the 6-month limitation contained in K.S.A. 44-528 did not apply to this situation as claimant's request for a change was not due to a change in her functional or work disability status but was due to the clarification of a legal principle that had been previously incorrectly applied. The ALJ found that *Bergstrom* should be applied retroactively and granted claimant a modification of her earlier Award from the 8 percent whole person functional impairment to a 65 percent work disability, effective the day after claimant's termination on January 26, 2004.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-528(a)(d) states:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

....

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.⁷

Although written in the disjunctive, the primary purpose of K.S.A. 44-528, the review and modification statute, is to permit awards to be reviewed and, if appropriate, modified when, due to a change in a claimant's physical condition or circumstances, *i.e.*, employment status or earnings, the original award has become either inadequate or excessive. In this case, there is no claim that claimant's condition or circumstances have changed. The only change is in how the applicable statutes are being interpreted by the Kansas Supreme Court.⁸

Review and modification, however, is not available to relitigate all issues. In *Randall*,⁹ the Kansas Supreme Court held that *res judicata* applies to foreclose "a finding of a past fact which existed at the time of the original hearing." Likewise, in *Scheidt*, the Kansas Court of Appeals held that a workers compensation case is, in most respects, like a court judgment and subject to *res judicata*. Issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute. The very nature of an employee's disability is an issue that must be decided in every final award.¹⁰

Additionally, the law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:

The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to

⁷ K.S.A. 44-528(a)(d).

⁸ *Urbano, supra*.

⁹ *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973).

¹⁰ *Scheidt, supra*, at 261.

afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.

In *State v. Finical*,⁹ the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

CONCLUSIONS

The November 28, 2005, Order of the Board granted claimant an 8 percent impairment to the whole body on a functional basis. No appeal was taken from that Order.

As such, that finding became the law of the case and is res judicata. There has been no change in circumstances. Therefore, claimant's request for a review and modification of that Order is denied and claimant is limited to the 8 percent whole body permanent impairment. Having reviewed the entire evidentiary file contained herein, the Board finds the Review & Modification Award of the ALJ should be reversed and the original Order of the Board from November 28, 2005, reinstated.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review & Modification Award of Administrative Law Judge Kenneth J. Hursh dated January 21, 2010, should be, and is hereby, reversed and the original Order of the Board from November 28, 2005, shall be and is reinstated. Claimant is limited to her 8 percent permanent disability on a functional basis.

IT IS SO ORDERED.

⁹ *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

Dated this ____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge